

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- II
KOLKATA**

I.A.(I.B.C)1277/KB/2023

In

Company Petition (IB) No. 172 of 2021

In the matter of:

An application under Section 95(1) of the Insolvency and Bankruptcy Code, 2016, read with [Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

In the matter of:

UCO Bank

...FINANCIAL CREDITOR

Versus

Mr. Ramdeo Pandey

...DEFENDANT/PERSONAL GUARANTOR

Versus

Mr. Jitendra Patnaik

...RESOLUTION PROFESSIONAL/APPLICANT

Date of Pronouncement of Order: **03.05.2024**

Appearances (via video conferencing/physically):

Mr. Santosh Kr. Ray, Adv.] For the Financial Creditor

Ms. Rituparna Sanyal, Adv.]

Ms. Swastika Sengupta, Adv.]

Ms. Manju Bhuteria] For the Personal Guarantor

Ms. Shreya Choudhary, Adv.]

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The Court Convened in a hybrid mode.

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2. This CP (IB) No. 172/KB/2023 has been preferred by the Financial Creditor to seek initiation of Insolvency Regulation Process against the Respondent Personal Guarantor to Corporate Debtor Rule, 2019 ('Personal Guarantors Rules') and regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 ('Personal Guarantors Regulations')
3. The amount in default is Rs.152,15,92,468.42p /-
4. The application is complete as required under Section 95 read with rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019.
5. It is to be noted that Hon'ble Supreme Court in the judgment of **Dilip B. Jiwrajka V/s Union of India & Ors. In WP (civil) No. 1281 of 2021** dated 09.11.2023 has upheld the Constitutional Validity of the Sections 94 to 100 and the propositions that can be culled out from the Judgments inter-alia are as follows:
 - i. *No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;*
 - ii. *The Resolution Professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;*
 - iii. *No adjudicatory function of Adjudicating Authority is contemplated at the admission stage. To read in such a*

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requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

- iv. The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and CP/IB/337/AHM/2020 12 of 17 to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;*
- v. There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;*
- vi. No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;*
- vii. The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application; CP/IB/337/AHM/2020 13 of 17*
- viii. The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings; and*
- ix. The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.*

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6. The Applicant had proposed the name of the Insolvency Professional for appointment as Resolution Professional. In view of the above, Mr. Jitendra Patnaik, IBBI Registration No. IBBI/IPA-002/IP-N00277/2017-18/10835, email ID jpatnaikassociates@gmail.com; Mobile No. 9831079953, was appointed as Resolution Professional, subject to his possessing a valid AFA, in exercise of the power conferred under Section 97 of the IBC, 2016 on this Authority.
7. The Resolution Professional was directed to file declaration within seven days to the effect that he fulfils all the requirements for being appointed as Resolution Professional in the matter which he has given, and to file his report in terms of Section 97 in two weeks.
8. The Resolution Professional **Mr. Jitendra Patnaik** has vide his report dated 23.11.2021 referred to the following :

1. DOCUMENTS REFERRED:-

- (i) Company Petition being C.P.(IB)/172/KB/2021;
- (ii) Deed of personal guarantee as annexed to the petition and marked as Annexure 'I' at Page No. 437 to 481;

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- (iii) Agreement for pledge of shares as annexed to the petition at page No. 424 to 436 and marked as Annexure 'H';
 - (iv) Copy of the notice issued by UCO Bank and reply received thereof which are annexed at page No. 510 to 544 in the petition and marked as Annexure – 'K';
 - (v) Copy of the demand notice issued by the Applicant Bank and attached at 545 to 554 of the company petition and marked as Annexure – 'L' and;
 - (vi) Other documents as attached to the company petition;
9. Resolution Professional submits that the respondents invariably agreed and committed to pay the dues of the applicant bank by providing personal guarantee dated 30.04.2015 in the event the principal borrower could not repay the total outstanding loan amount to the Applicant bank.
10. That the respondent herein was one of the key-promoters of Divine Alloys and Power Company Limited (in Liquidation). The Respondent along with his sons; Mr. Akilesh Pandey and Rajesh Pandey was running said Divine Alloys and Power Company Limited (in Liquidation).

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11. The said Divine Alloys and Power Company Limited (in Liquidation) defaulted in the repayment of loans availed from the several banks and consequent to such default; The IBC registered as C.P.(IB)/1412/KB/2018 wherein the process of CIRP commenced, however, no resolution plan could be approved by the Committee of Creditors and for that purpose the said company went into liquidation by order dated 11.05.2021.
12. The account with the Applicant bank became Non Performing Asset (NPA) on 31st March, 2016 and by a letter dated 12th July, 2019 the Applicant bank issued demand notice to the Corporate Debtor and its guarantors for payment of the outstanding dues.
13. Furthermore, the Applicant bank issued a demand notice dated 6th April, 2021 to the guarantors under Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 demanding the repayment of Rs.1,52,15,92,462.42p/- the same was served upon the respondent on 17th April, 2021. The Respondent neither paid any amount nor controverted the said demand notice.
14. Further pursuant to the guarantee agreement which was executed on 30th April, 2015 the guarantor/the respondent agreed that the liability of the respondent shall not exceed the sum of Rs.461.09 Crore + all interest, liquidator damages, commitment charges, costs, charges and other monies payable by the borrower to the lenders under any agreement or document.
15. Upon failure of the respondent to pay the debts within a period of 14 days of service of the notice of demand and the relevant evidence of such default or non-repayment of the debt.

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16. The Resolution Professional has recommended admission of the Petition.
17. The Personal Guarantor by way of his reply has refuted/contradicted the statements of the RP in the following manner:
- i. The applicant under Section 95 of the Code has been filed on the basis of Deed of Guarantee which clearly mentions that the Guarantee is being given in consideration of the Lenders having agreed to grant/granted certain reliefs and concession to the borrowers and having restructured/agreed to restructure the financial assistance/debts as mentioned in Schedule II of the Deed of Guarantee. Schedule II of Deed of Guarantee talks about additional term loan to be provided by the lender, UCO Bank. The same has not been granted by the UCO Bank, as such the Deed of Guarantee has become infructuous, null and void and cannot be acted upon. The Application is not maintainable and is liable to be dismissed.
 - ii. It is a fact that the Term Loan has not been granted, as such the application on the basis of the said Deed of Guarantee is not maintainable.
 - iii. The Financial Creditor did not act in terms of the approved CDR Package, reason whereof the CDR Package failed.
 - iv. A suit being Title Suit No.368 of 2018 has been filed against the Lenders wherein UCO Bank is defendant no.2 inter alia praying for following reliefs:
 - a. For a decree for realization of the sum of Rs.1150.30 crores from each of the defendants and their consortium as per schedule of the claim.

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- v. The said suit is still pending as such steps for initiating Insolvency Process is not maintainable and liable to be dismissed.
- vi. The Personal Guarantor talks of a JLF meeting held on 26.12.2016 A/c-M/s Divine Alloys & Power Co. Ltd. (DAPCL) which records the member bankers assured every co-operation on getting a final view on the proposal submitted by the company from their respective competent authorities.
- vii. By way of written notes of argument the Personal Guarantor has said that:
 - a. CDR-EG Approval was given to the Joint Lenders Forum (JLF); Master Restructuring Agreement dated 02.02.2015 and Supplementary Master Restructuring Agreement dated 30.04.2015 were accordingly executed by the members of the JLF jointly.
 - b. Non-disbursal of Rs.3.94 Crore of Term Loan (UCO Bank's share) by the UCO Bank was the only reason for non-disbursal of entire Term Loan of Rs. 18 Crore by the JLF (as it was to be disbursed by the JLF only when all the seven members disburse their share of the loan simultaneously through the Lead Bank PNB) and hence the Rolling Mill Plant and Machineries which would have brought back the viability could never be installed, obviously leading to the default by the Corporate Debtor.
 - c. As the Financial Creditor failed and neglected to provide the financial assistance which was required to be provided under the approved CDR package, the CDR failed.
 - d. In August 2016 new proposal was given by the Borrower as the CDR Package could not be implemented due to the default by Bank of India and the Applicant. The CDR was required to be

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- implemented in 2015-16 and repayment was to start from June, 2016, however, CDR Package was not implemented.
- e. All the Joint Lenders' Forum meetings held subsequent to 8th August, 2016 were held to consider new repayment plan which was given by the Borrower.
 - f. The Applicant has not acted in terms of the CDR Package reason whereof the CDR Package had failed.
 - g. It is an admitted position that the Applicant did not provide the additional term loan as per the CDR.
 - h. It is evident that due to non-disbursement of sum as required under the CDR Package, the CDR failed.
 - i. It is alleged that the demand notice and application was not served on the Personal Guarantor.
 - j. At page 8 of the Petition, the address of the Personal Guarantor has been mentioned to be "Divine House, Taj Mahal Club Road, Ranchi 834001, Jharkhand" which is the office of the Corporate Debtor (In Liquidation). The address of the Personal Guarantor is 212/C, Ashok Nagar, Road No.1, Ranchi, Jharkhand – 834002.
 - k. The Resolution Professional has stated that no but documents or information has been provided. It is evident that in absence of information or document, the Resolution Professional could neither file report nor file any recommendation. As such, the Report of the Resolution Professional cannot be accepted.
18. The Resolution Professional has denied that the notice was not served on the Personal Guarantor and has asserted that the notice was sent at the last known address of the Personal Guarantor.
19. In rejoinder the Resolution Professional says that:

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“The Principal borrower is under Liquidation and the Respondent, being the personal guarantor is admittedly liable to pay the outstanding dues of the Applicant Bank.”

20. We have considered the report and perused the details of claim indicated therein.

21. A JLF meeting held on 27.07.2017 records the following:

Sri Akhilesh Pandey, MD of the company briefed that they are in financial trouble and also expressed that still the market of Steel Industry has not improved although it is foreseen for improvement in coming months. Sri Pandey informed that they have already given mandate for TEV to PNB ISL after discussion with HO PNB and already paid Rs.10.00 lacs out of arrears of last payment and shall be clearing complete amount for this purpose. He also stated bank may consider any inspection/audit after getting TEV report. He requested Mr. S. Saha, consultant of the company to elaborate company's progress on various issues emerged on discussion amongst the member bankers.

Sri Saha stated that the Company is still under stress and financial crunch. They need a solution on this so as to improve the performance of the company and repayment bank dues. He also said that company is ready to provide all the papers/documents required as

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early as possible and also requested the bankers to take a final view on the proposal submitted. He submitted as under.

1. Company is having no issue in appointment of nominee directors and concurrent auditor.
2. ABS dated 31.03.2017, latest Net Worth position of promoters and guarantors and other documents/papers will be submitted within 15 days.
3. On stock audit report he said that DP has reduced due to cash loss suffered by the company and they are trying for strategic investors/partners and also exploring possibilities of getting job/work orders but there is no fruitful result/conclusion in this regard. He also added that the company is also trying to bring strategic investor and is also planning to take help of professionals like PNBISL etc.
4. Forensic Audit and TEV may be done simultaneously. TEV has to be completed within 15 Days.
5. He requested to maintain the existing tagging arrangement till next meeting.
6. He agreed to convert all the physical shares to DEMAT and pledge the same with the lead Bank within a week.
7. He assured immediate renewal of lease agreement as discussed
8. So far the runnings of captive power plants are concerned, the company is having coal linkage with CCL and he explained that it will be cost effective on running of captive plants. However, as a backup arrangement they have also taken power supply from JBVNL.

22. Further a JLF meeting held on 12.09.2017 records:

Action Point	Status as on 12.09.2017
Submission of TEV report within 15 days	Yet to be submitted
Company to submit latest asset-liabilities and net worth position of promoters and guarantors within 15 days	Yet to be submitted
Submission of ABS as on 31.03.2017 of the company within 15 days	Yet to be submitted
Joint visit of the unit by the consortium members	Done on 05.08.2017. Report shared with all the members
Conversion of physical shares of the company in dematerialized form and pledge of the same as per CDR approval	Yet to be submitted
Compliance of observation as reported in Due Diligence report regarding constitution of various committees and appointment of independent director	Not yet submitted/complied
Conducting forensic audit in the account	PNB has recommended to their ZO/HO for the same.
Renewal of lease agreement of the collateral security	Yet to be submitted
Valuation of plant and machinery of the company	PNB has assigned the work to its panel valuers
Introduction of strategic Investor in the company	Yet to be introduced

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23. The default in the part of the Personal Guarantor being established we are satisfied with the recommendation.

24. In regard to the plea of limitation taken, we find that the JLF meetings with the Personal Guarantor and Promoters continued till September 2017, the account with the Applicant bank became NPA on 31st March, 2016. The demand notice was signed on 12.07.2019. In Pooja Ramesh Singh Hon'ble NCLAT has held as under:

"24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression 'due' occurring in Section 3(11) uses two additional expression i.e. "payable" and "is not paid by the debtor or corporate debtor". The expression 'is not paid by the debtor' has to be given some meaning. As laid down by the Hon'ble Supreme Court in "Syndicate Bank vs. Channaveerappa Beleri & Ors." (supra), a guarantor's liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well-settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor's liability has to be read from the Deed of Guarantee."

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In Form B under Rule 7(1) was issued on 06.04.2021, whereafter the Financial Creditor invoked contract of guarantee by serving demand notice on Personal Guarantor in form B on 06.07.2021 The Personal Guarantor vide email dated 20th March, 2022 admitted that the company along with group of companies and other Personal Guarantor submitted one time settlement (OTS) of Rs. 15 Crore with State Bank of India for settling and clearing its dues.

Since the OTS proposal was made by the company along with group of companies and other Personal Guarantor and the same was admitted by the Personal Guarantor vide email dated 20th March, 2022. The acknowledgment of liability from time to time would extend the limitation under Section 18 of the Limitation Act, 1963.

25. Hence, this application is admitted with the following directions:

(1) Since the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

(2) During the moratorium period:-

(a) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) The creditors shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

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(3) Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under Sub-Section (1) shall operate against all the partners of the firm.

(4) The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

26. Company Petition No. 172 of 2021 is thus admitted.

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27. Next date for consideration would be **19.06.2024**.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Singed on this, the **3rd May, 2024**.

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SG, Steno